Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

OCTOBER TERM, 2002

GAYLORD CONTAINER CORP., GEORGIA-PACIFIC CORP., INTERNATIONAL PAPER CO., JEFFERSON SMURFIT CORP., PACKAGING CORPORATION OF AMERICA, INC., SMURFIT-STONE CONTAINER CORP., STONE CONTAINER CORP., TEMPLE-INLAND, INC., TENNECO, INC., TENNECO PACKAGING, INC., UNION CAMP CORP., AND WEYERHAEUSER CO.,

Petitioners,

v.

GARRETT PAPER, INC., GENERAL REFRACTORIES CO., ALBERT I. HALPER CORRUGATED BOX CO., LOCAL BAKING PRODUCTS, INC., AND OAK VALLEY FARMS, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR WRIT OF CERTIORARI

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January 14, 2003

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QUESTIONS PRESENTED

1. Whether the Third Circuit erred by allowing, contrary to the Fourth, Fifth, and Ninth Circuits, class certification for antitrust claims that involve an element—individual injury—that cannot be established on a classwide basis.

2. Whether the Third Circuit erred by allowing, contrary to the Fourth Circuit, class certification for claims that would be time-barred but for a doctrine—fraudulent concealment—that cannot be established on a classwide basis.

RULE 29.6 STATEMENT

Gaylord Container Corp. is wholly owned by Temple-Inland, Inc.

Georgia-Pacific Corp. has no parent corporation, and no publicly held company owns 10% or more of its stock.

International Paper Co. has no parent corporation, and no publicly held company owns 10% or more of its stock.

Jefferson Smurfit Corp. is wholly owned by Smurfit-Stone Container Corp.

Packaging Corporation of America, Inc., has no parent corporation, and no publicly held company owns 10% or more of its stock.

Smurfit-Stone Container Corp. has no parent corporation, and no publicly held company owns 10% or more of its stock.

Stone Container Corp. is wholly owned by Smurfit-Stone Container Corp.

Temple-Inland, Inc., has no parent corporation, and no publicly held company owns 10% or more of its stock.

Tenneco, Inc., has no parent corporation, and no publicly held company owns 10% or more of its stock.

Tenneco Packaging, Inc., has no parent corporation, and no publicly held company owns 10% or more of its stock.

Union Camp Corp. has been merged into International Paper Co.

Weyerhaeuser Co. has no parent corporation. Capital Research and Management Company, a publicly held company, owns 10% or more of its stock.

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INTRODUCTION

This case is to antitrust class actions what *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), was to mass tort class actions. Respondents (five small companies) seek to bring treble-damages antitrust claims against much of the American paper industry on behalf of all entities (including some of the largest corporations in the world) that purchased corrugated boxes and sheets from petitioners in literally millions of individual transactions over a two-year period in the early 1990s. Brushing aside precedent from other federal courts, the Third Circuit (speaking through Senior Judge Aldisert) allowed respondents to pursue such claims in a class action, even though, for two basic reasons, respondents cannot possibly establish petitioners' liability on a classwide basis.

First, respondents cannot establish that each and every member of their putative classes was injured by the alleged antitrust conspiracy. A plaintiff must prove injury in order to establish antitrust liability. The Third Circuit, however, held that the requirement of injury presented no barrier to class certification, relying on respondents' assurances that injury could be proven on a classwide basis at trial. That holding not only is wrong, but conflicts with holdings from the Fourth, Fifth, and Ninth Circuits.

Second, respondents cannot establish that each and every member of their putative classes has a timely claim. Respondents filed this lawsuit after the expiration of the relevant four-year statute of limitations on many of their claims, and invoked the doctrine of fraudulent concealment to avoid the time bar. That doctrine, however, requires each plaintiff to establish that he or she did not discover the basis for his or her claim within the limitations period notwithstanding his or her own due diligence. The Third Circuit held that this inherently individualized inquiry presented no barrier to class certification. That holding not only is wrong, but conflicts with the Fourth Circuit's contrary holding in *Broussard v. Meineke*

Discount Muffler Shops, Inc., 155 F.3d 331 (1998) (Wilkinson, C.J.). Indeed, in its opinion, the Third Circuit expressly recognized the existence of such a conflict.

Both issues go to the very core of the class-action device. By authorizing respondents to pursue these claims on behalf of classes including entities that could not possibly establish liability against petitioners, the Third Circuit violated not only the command of the Rules Enabling Act that the Federal Rules of Civil Procedure "shall not abridge, enlarge or modify any substantive right," 28 U.S.C. § 2072(b), but also constitutional principles of due process, *see, e.g.*, *Hansberry v. Lee*, 311 U.S. 32, 44-46 (1940). As a practical matter, the Third Circuit thereby handed the antitrust plaintiffs' bar a powerful tool to exact unwarranted settlements from defendants in industry-wide treble-damages litigation. *Cf. In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298-99 (7th Cir. 1995) (Posner, J.) (discussing settlement pressures on defendants in class actions). This Court should not tolerate such abuse of the class-action device. If this judgment stands, an entire industry may potentially face a nationwide damages action that simply would not be countenanced in other circuits. This Court's review is needed to ensure uniformity in this vital arena of federal law.

OPINIONS BELOW

The Third Circuit's opinion is reported at 305 F.3d 145 and reprinted in the Appendix ("App.") at 3a-34a. The unreported order denying the petition for panel rehearing and rehearing *en banc* is reprinted at App. 1a-2a. The unreported order granting leave to appeal from the district court's decision to grant class certification is reprinted at App. 35a-36a. The district court's opinion certifying the classes is reported at 203 F.R.D. 197 and reprinted at App. 37a-89a.

JURISDICTION

The Third Circuit entered judgment on September 5, 2002. Petitioners timely filed a petition for panel rehearing and rehearing *en banc*, which was denied on October 16, 2002. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

In relevant part, Rule 23 of the Federal Rules of Civil Procedure states as follows:

> **(a) Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
>
> **(b) Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition * * *
>
> > (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the

> controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.
>
> * * *
>
> **(f) Appeals.** A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

STATEMENT OF THE CASE

A. Background

This is a case about linerboard, a heavyweight paper that can be glued to the outer surfaces of fluted cardboard to make, among other things, corrugated boxes and sheets. *See* App. 4a n.1. Petitioners are vertically integrated manufacturers and sellers of linerboard and corrugated boxes and sheets. *See id.* Respondents are small purchasers of corrugated boxes and sheets, *not* of linerboard. *See id.* at 5a-6a.

This case involves allegations that petitioners conspired to reduce the output of linerboard, and thus indirectly to raise the prices of corrugated boxes and sheets made in part of linerboard. In 1998, after a lengthy industry-wide investigation, the Federal Trade Commission (FTC) filed an administrative complaint solely against petitioner Stone Container Corp., alleging that Stone had engaged in unilateral conduct in violation of section 5 of the FTC Act. *See id.* at 38a. Notably, the FTC alleged in its complaint only that Stone had attempted

to reduce its own linerboard inventories and *invited* its competitors to join in a conspiracy to raise linerboard prices; the FTC did not allege that any other manufacturer had *accepted* Stone's invitation, or that any conspiracy actually *existed*. *See id.* Stone eventually entered into a consent decree with the FTC, under which the company made no admission of liability for its alleged unilateral misconduct under section 5. *See id.*

B. The District Court Proceedings

Shortly after the FTC filed its complaint against Stone, three purchasers of corrugated sheets, including two of the respondents, filed separate federal class actions in the Northern District of Illinois. *See id.* at 38a-39a. These complaints named only Stone as a defendant, but alleged that Stone and unnamed entities had engaged in an antitrust conspiracy to raise linerboard prices. *See id.* at 39a. The complaints alleged that this conspiracy lasted from June 1993 until at least March 1995. *See, e.g.*, C.A. App. 112. Around the same time, four purchasers of corrugated boxes, including the other three respondents, filed separate federal class actions in the Eastern District of Pennsylvania, raising similar claims and again naming only Stone as a defendant. *See* App. 39a. Those complaints alleged that the conspiracy began in October 1993 and ended in November 1995. *See, e.g.*, C.A. App. 120.

In late 1998, Stone moved to dismiss the complaints filed by the sheet purchasers. *See* App. 39a. On January 8, 1999, the Illinois district court denied that motion. *See General Refractories Co. v. Stone Container Corp.*, No. 98-C-3543, 1999 WL 14498 (N.D. Ill. Jan. 8, 1999). On February 12, 1999, the Judicial Panel on Multidistrict Litigation transferred the sheet purchasers' actions from the Northern District of Illinois to the Eastern District of Pennsylvania, where the complaints filed by the box purchasers were still pending. *See* App. 40a.

On May 14, 1999, the box plaintiffs filed a new, consolidated class action complaint, which for the first time named twelve defendants in addition to Stone, including all of the other petitioners (or their corporate predecessors). *See id.* That amended complaint alleged that these additional defendants had in fact accepted Stone's invitation to reduce linerboard output and thereby raise linerboard prices, and thus had engaged in a conspiracy in violation of the Sherman Act. *See id.* Four days later, the sheet plaintiffs also filed a new, consolidated class action complaint, naming all of the petitioners (or their corporate predecessors) except Stone and Tenneco Inc., and making similar allegations. *See id.*

On September 1, 1999, defendants moved to dismiss the new consolidated complaints on a number of substantive grounds. *See id.* at 41a. On October 4, 2000, the district court denied the motions to dismiss. *See In re Linerboard Antitrust Litig.*, Civ. No. 98-5055, 2000 WL 1475559 (E.D. Pa. Oct. 4, 2000).

Both the box plaintiffs and the sheet plaintiffs then moved for class certification. *See* App. 41a-42a. The two groups of plaintiffs sought certification of essentially identical classes, comprising all entities nationwide that purchased corrugated boxes or sheets from the defendants between October 1, 1993, and November 30, 1995, *see id.*—classes that included not only small companies such as respondents, but also some of the largest corporations in the world.

In opposing class certification, petitioners made various arguments, two of which are germane here. First, petitioners contended that respondents could not establish liability on a classwide basis because the fact of injury, an essential element of antitrust liability, required an individualized inquiry. Second, petitioners contended that respondents could not establish the timeliness of their claims on a classwide basis in light of their reliance on the inherently individualized doctrine of fraudulent concealment.

The district court, however, rejected both of these arguments, and certified the following two classes, *sua sponte* modifying the proposed classes to exclude some purchasers that were indisputably not injured because their contractual prices for corrugated boxes and sheets were not linked to the price of linerboard:

> **Sheet Class**. All individuals and entities which purchased corrugated sheets in the United States directly from any of the defendants during the class period from October 1, 1993 through November 30, 1995, excluding the defendants, their co-conspirators, and their respective parents, subsidiaries and affiliates, as well as any government entities, and excluding those individuals or entities which purchased corrugated sheets pursuant to contracts in which the purchase price was not tied to the price of linerboard.
>
> **Box Class**. All individuals and entities which purchased corrugated containers in the United States directly from any of the defendants during the class period from October 1, 1993 through November 30, 1995, excluding the defendants, their co-conspirators, and their respective parents, subsidiaries and affiliates, as well as any government entities, and excluding those individuals and entities which purchased corrugated containers pursuant to contracts in which the purchase price was not tied to the price of linerboard or containerboard.

Id. at 88a-89a.

C. The Court Of Appeals Proceedings

Petitioners then applied for an interlocutory appeal of the class certification order pursuant to Fed. R. Civ. P. 23(f). A panel of the Third Circuit (Mansmann, Alito, and McKee, JJ.) granted the application. *See id.* at 35a-36a.

A different panel of the Third Circuit (Aldisert, S.J., McKee, and Fuentes, JJ.), however, affirmed the class certification order. *See id.* at 3a-34a. On the issue of fact of injury, the court accepted respondents' assurances that they could establish injury on a classwide basis at trial. *See id.* at 14a-18a. The court noted that plaintiffs' experts had concluded that the alleged conspiracy would have injured all putative class members, and added that the experts' conclusion was "significant because it was supported by charts and studies." *Id.* at 15a. The court noted that one of plaintiffs' experts had determined that the price of corrugated boxes and sheets was closely *correlated* with the price of linerboard, and had relied on that determination in concluding that the conspiracy to reduce linerboard output necessarily *caused* purchasers of corrugated boxes and sheets to pay higher prices. *See id.* And the court agreed with the district court that plaintiffs need not identify a particular econometric model for demonstrating fact of injury (or proving damages) on a classwide basis at the class-certification stage. *See id.* at 18a.

On the issue of fraudulent concealment, the Third Circuit held that class certification was appropriate notwithstanding the need for respondents to establish certain elements on an individualized basis. The court noted that "[t]he cumulative experience of the judiciary has not been uniform" on this issue, *id.* at 28a & n.12, and expressly acknowledged a circuit split between the First and Fourth Circuits, *see id.* at 31a-32a (citing *Waste Management Holdings, Inc. v. Mowbray*, 208 F.3d 288 (1st Cir. 2000), and *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331 (4th Cir. 1998)). The Third Circuit cast its lot with the First Circuit, asserting that "common issues of concealment predominate here because the inquiry necessarily focuses on defendants' conduct, that is, what defendants did rather than what plaintiffs did." *Id.* at 32a (internal quotation omitted). According to the court, "[i]t is the fact of *concealment* that is the polestar in an analysis of

fraudulent concealment." *Id.* at 32a-33a.

The Third Circuit denied panel rehearing and rehearing *en banc*. *See id.* at 1a-2a. This petition follows.

REASON FOR GRANTING THE WRIT

THE THIRD CIRCUIT ERRED, AND DEEPENED CIRCUIT CONFLICTS, BY AFFIRMING CLASS CERTIFICATION HERE.

This case presents two related questions on which the federal courts of appeals are divided: (1) whether the fact of individual injury can be established on a classwide basis in antitrust actions, and (2) whether fraudulent concealment can be established on a classwide basis in actions in which that doctrine is necessary to revive otherwise time-barred claims. Both questions directly implicate the underlying purpose of the class action mechanism, which was "designed as an *exception* to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *General Tel. Co. v. Falcon*, 457 U.S. 147, 155 (1982) (emphasis added; internal quotation omitted). If the Third Circuit's decision is allowed to stand, and representative plaintiffs are allowed to litigate on behalf of classes even where, as here, liability cannot be established on a classwide basis, the "exception" will swallow the rule. Allowing inherently individualized issues to be litigated on a classwide basis violates not only the procedural requirements of Rule 23—namely, the overlapping requirements of commonality, typicality, and adequacy of representation under Rule 23(a), and of predominance and superiority under Rule 23(b)(3)—but also the underlying substantive commandments of the Rules Enabling Act and the Due Process Clause. To ensure fidelity to these requirements, and to resolve circuit conflicts over the application of Rule 23 in this context, *certiorari* is warranted on both questions.

A. The Third Circuit Erred, And Deepened A Circuit Conflict, By Holding That The Fact Of Individual Injury In Antitrust Cases Can Be Established On A Classwide Basis.

Certiorari is warranted here because the Third Circuit erred, and deepened a circuit split, on the fundamental issue whether an inherently individualized element of antitrust liability—fact of injury—precludes class certification. The Fourth, Fifth, and Ninth Circuits have held that it does; the Second and now the Third Circuits, in contrast, have held that it does not.

The analytical framework for a private antitrust claim under the Clayton Act is well-established: to establish liability, the plaintiff must prove (1) a violation of the antitrust laws, and (2) individual injury resulting from that violation. *See* 15 U.S.C. § 15a; *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n.9 (1969). The fact of individual injury, in other words, is a *liability* issue, not simply a *damages* issue. *See, e.g., In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 136 (2d Cir. 2001), *cert. denied sub nom. Visa U.S.A. Inc. v. Wal-Mart Stores, Inc.*, 122 S. Ct. 2382 (2002); *American Bearing Co. v. Litton Indus., Inc.*, 729 F.2d 943, 948 (3d Cir. 1984); *Windham v. American Brands, Inc.*, 565 F.2d 59, 65 (4th Cir. 1977) (*en banc*).[1]

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[1] It is true that *whether* a particular plaintiff has suffered an injury (that is, the fact of injury) is closely related to *how much* the plaintiff was in fact injured (that is, the amount of damages). This Court, however, has not only recognized that these are discrete inquiries, but also expressly stated that the standard of proof for the fact of injury is higher than that for the amount of damages. *See Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931); *see generally* Philip Areeda, Comment, *Antitrust Violations Without Damage Recoveries*, 89 Harv. L. Rev. 1127, 1128 (1976) (noting that courts "insist upon a greater degree of proof of the fact

(continued...)

In *Windham*, the *en banc* Fourth Circuit held that fact of injury is an individual question that precludes class certification. The court emphasized that "[w]hile [an antitrust] case may present a common question of violation, the issues of injury and damage remain the critical issues in such a case and are *always* strictly individualized." *Id.* at 66 (emphasis added). Notably, the court upheld the district court's conclusion that individual issues predominated even though at least some of the plaintiffs were bringing claims that defendants *directly fixed* the price of the product plaintiffs had purchased, *see id.* at 64, 67—claims that do not present nearly the same individualized causation difficulties as the claims at issue here, where plaintiffs purchased *different* products (corrugated boxes and sheets) from the one as to which a reduction in output was alleged (linerboard). The Fourth Circuit reasoned that "[t]he gravamen of the complaint is not the conspiracy; the crux of the action is injury, individual injury." *Id.* at 66. It therefore agreed with the district court that "the complexity of [plaintiffs'] claims as they would relate to injury and damages" and "the highly individualized character the proof of injury and damges would assume" precluded certification. *Id.*

The Fifth Circuit agrees. In *Shumate & Co. v. National Association of Securities Dealers, Inc.*, 509 F.2d 147 (1975), the Fifth Circuit considered a class action brought by a securities dealer against various stock exchanges and individuals, alleging that the defendants had conspired to exclude securities from the NASDAQ system and to ignore securities once they were included in that system, *see id.* at 149. The court upheld the district court's conclusion that class certification was inappropriate. *See id.* at 155. The court distinguished that case from "one where liability can be shown

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[1] (...continued)
of injury than would suffice for proof of the quantum of damage").

as to all class members, with only the amount of damage to be determined as to each." *Id.* Instead, it reasoned that, in an antitrust case, "the proof of injury to business or property of each class member is critical for the determination of defendants' liability to any individual." *Id.*

In *Alabama v. Blue Bird Body Co.*, 573 F.2d 309 (1978), a prominent case in class action jurisprudence, the Fifth Circuit expounded on its reasoning in *Shumate*. In *Blue Bird*, the State of Alabama brought a class action on behalf of all governmental entities in the United States that purchased school bus bodies against manufacturers of those bodies; Alabama, like the plaintiffs in *Windham*, brought antitrust claims alleging that defendants had, *inter alia*, directly fixed the price of the product plaintiffs had purchased. *See id.* at 311. After a lengthy discussion of the Fourth Circuit's decision in *Windham* and its own earlier decision in *Shumate*, the Fifth Circuit reversed the district court's decision to certify a nationwide class and remanded for further proceedings. *See id.* at 326-27, 330. The court reasoned that "the fact that a case is proceeding as a class action does not in any way alter the substantive proof required to prove up a claim for relief," and added that "'impact' is a question unique to each particular plaintiff and one that must be proved with certainty." *Id.* at 327. Unsurprisingly, the Fourth Circuit's decision in *Windham* and the Fifth Circuit's decision in *Blue Bird* have frequently been cited in tandem by class-action defendants for the proposition that individual issues predominate over common issues even in "traditional" price-fixing cases. *See, e.g., In re Vitamins Antitrust Litig.*, 209 F.R.D. 251, 265 (D.D.C. 2002); *In re Cardizem CD Antitrust Litig.*, 200 F.R.D. 297, 308 (E.D. Mich. 2001); *Paper Sys. Inc. v. Mitsubishi Corp.*, 193 F.R.D. 601,

613-14, 615 (E.D. Wis. 2000).[2]

In like manner, the Ninth Circuit has also forbidden class certification under these circumstances. In *In re Hotel Telephone Charges*, 500 F.2d 86 (9th Cir. 1974), the court considered allegations of a nationwide conspiracy among hotel chains to increase room telephone charges, *see id.* at 88. The court noted that fact of injury required individualized analysis because each class member would have to prove that he patronized a hotel while the surcharge was in effect and that he absorbed the cost of the surcharge. *See id.* The court concluded that "this suit raises far too many individual questions to qualify for class action treatment." *Id.* at 89.

The Second Circuit, by contrast, has taken the opposite approach. In *In re Master Key Antitrust Litigation*, 528 F.2d 5 (2d Cir. 1975), the court considered a class action by building owners alleging that the manufacturers of so-called "builders' hardware" had conspired to reduce competition and raise prices, *see id.* at 7. Although the court ultimately dismissed defendants' appeal from the district court's decision to certify the class, it nevertheless addressed the merits of defendants' claims in determining whether it had jurisdiction to hear the appeal under the collateral-order doctrine. *See id.* at 11-12. With regard to fact of injury, the court reasoned that "[i]f the [plaintiffs] establish at the trial for liability that the defendants

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[2] To be sure, the court did recognize that there might be some cases in which fact of injury, or "impact," could be established through classwide proof. *See Blue Bird*, 573 F.2d at 327 & n.34. But here, of course, the causation inquiry is even more complex than in *Blue Bird* itself, given that respondents are alleging a conspiracy to reduce the supply of one product (linerboard) that is *different* from the product they purchased (corrugated boxes and sheets). As the district court below tacitly acknowledged by excluding some purchasers from the class, injury to any given downstream purchaser in such a case is not guaranteed, and certainly cannot be assumed for an entire nationwide class.

engaged in an unlawful national conspiracy which had the effect of stabilizing prices above competitive levels, and further establish that the [plaintiffs] were consumers of that product, we would think that the jury could reasonably conclude that [defendants'] conduct caused injury to each [plaintiff]." *Id.* at 12 n.11. The Second Circuit's opinion thus suggests that fact of injury is ordinarily not an individual issue that precludes class certification. *Cf. Blue Bird*, 573 F.2d at 324 (discussing *Master Key*); Matthew Lloyd Larrabee, Note, *Substantive Policies and Procedural Decisions: An Approach to Certifying Rule 23(b)(3) Antitrust Class Actions*, 31 Hastings L.J. 491, 503 (1979) (same).

This case presents an ideal vehicle for resolving the important and recurring issue whether the inherently individualized issue of injury precludes class certification. In this case, unlike the "traditional" price-fixing case, there is abundant reason to believe that not all of the would-be class members suffered injury: class members did not purchase the product that was the subject of the alleged conspiracy (here, linerboard) from the defendants, but rather purchased *different* products (here, corrugated boxes and sheets). A given plaintiff must therefore show not only that it made a purchase during the class period, but also that its purchase price was causally linked to the reduction in output of a component of the product. If, for example, an integrated seller of corrugated boxes or sheets decided to absorb, in the case of a particular buyer, any purported increase in the "cost" of linerboard that allegedly resulted from its own decrease in linerboard output, then that buyer would suffer no injury. Thus, to the extent that such would-be class members made indirect *purchases* of the component product from the defendants, they suffer analogous causation difficulties to those faced by indirect *purchasers*, who for that reason are barred altogether from pursuing Sherman Act claims. *See Illinois Brick Co. v. Illinois*, 431 U.S. 720, 730-31 (1977). Indeed, by the class-certification stage,

defendants had already identified ample evidence that at least some class members suffered *no* injury from defendants' alleged conduct, as the district court partially conceded in modifying the proposed class definitions. *See, e.g.*, C.A. App. 1033-34, 1417, 1421-1539, 1555; C.A. Supp. App. 42. In the light of this evidence, any assertion that fact of injury can somehow be proven on a classwide basis is simply illusory.

The Third Circuit erred by accepting respondents' assurances that their "experts" could establish individual injury to all class members; because, as the Fourth Circuit emphasized in *Windham*, the injury issue is *inherently* individualized, it simply cannot be established on a classwide basis. 565 F.2d at 66. No expert can prove on a classwide basis that each and every member of a putative class was injured by an alleged antitrust violation—determining which class members were injured would require an individual analysis of every transaction. *See, e.g., id.*; *Kline v. Coldwell, Banker & Co.*, 508 F.2d 226, 236 & nn.8-9 (9th Cir. 1974). Needless to say, plaintiffs cannot obtain class certification with respect to an inherently individualized issue by simply asserting that their "experts" can address that issue on a classwide basis. Were the law otherwise, the requirements of Rule 23 would be a hollow formality, because plaintiffs could simply proffer "expert" testimony purporting to show that inherently individualized issues were common after all.

The effect of the Third Circuit's decision cannot be overstated. By allowing respondents to proceed with a class action simply by proffering experts who assert that the fact of injury can be established on a classwide basis, the Third Circuit has subjected petitioners to the risk of a trial in which they, as defendants, may be forced to bear the burden of demonstrating that each of thousands of individual plaintiffs, including absent class members, was *not* injured by their alleged misconduct. By shifting the burden of proof in this manner, the Third Circuit has not only violated the requirements of Rule 23, but also

abridged petitioners' substantive rights in violation of the Rules Enabling Act, 28 U.S.C. § 2072(b), and contravened basic constitutional principles of due process. And the lenient approach adopted by the Third Circuit to the fact-of-injury issue "encourage[s] plaintiffs' attorneys to seek certification * * * in hopes of exploiting the enormous tactical advantages of class status during settlement negotiations." Larrabee, *supra*, at 507.

B. The Third Circuit Erred, And Deepened A Circuit Conflict, By Holding That Fraudulent Concealment Can Be Established On A Classwide Basis.

The Third Circuit's decision in this nationally significant case raises a second issue—fraudulent concealment in class actions—that has been the subject of substantial conflict and inconsistency in the federal court system. As this Court has noted, fraudulent concealment is an equitable doctrine that is read into every federal statute of limitation. *See Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946). It is invoked "fairly often" in antitrust litigation, *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 195 (1997), as a means of extending the Clayton Act's four-year limitations period for antitrust claims, *see* 15 U.S.C. § 15*b*. In this case, there is no question that plaintiffs must prove fraudulent concealment in order to prevail on many of their claims: as the Third Circuit noted, *see* App. 27a, most of the class period (from October 1993 to November 1995) falls more than four years before the complaints were filed in May 1999, and claims relating to purchases made during that portion of the class period will thus be time-barred absent tolling of the statute of limitations through a doctrine such as fraudulent concealment.

Although fraudulent concealment is a judge-made doctrine, there is broad consensus that it has three elements: (1) concealment by the defendant of the conduct underlying the cause of action; (2) a failure by the plaintiff to discover his cause of action notwithstanding such concealment; (3) the

exercise of due diligence by the plaintiff in attempting to discover the cause of action. *See, e.g., In re Lower Lake Erie Iron Ore Antitrust Litig.*, 998 F.2d 1144, 1178-79 (3d Cir. 1993); *Norton-Children's Hospitals, Inc. v. James E. Smith & Sons, Inc.*, 658 F.2d 440, 443 (6th Cir. 1981); *In re Beef Indus. Antitrust Litig.*, 600 F.2d 1148, 1169 (5th Cir. 1979). It is also "generally" recognized, in the class action context, that the discovery and diligence elements of fraudulent concealment require an individualized inquiry. *See* 70 A.L.R. Fed. 498 (1984) (citing cases).[3]

As the Third Circuit frankly conceded, however, courts are divided on the recurring question whether the inherently individualized nature of these elements of the fraudulent concealment doctrine precludes class certification. *See* App. 31a-32a. The Fourth Circuit has held that it does. *See Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331 (1998). In *Broussard*, the Fourth Circuit considered the certification of a class of franchisees that alleged that their franchisor had committed torts and breach of contract by misusing funds the franchisees paid for use in advertising. *See id.* at 334-36. Many of the franchisees' claims would have been time-barred but for the doctrine of fraudulent concealment. *See id.* at 336.

The Fourth Circuit reversed the district court's decision to certify a class. *See id.* at 352. Writing for the court, Chief Judge Wilkinson explained that "when the defendant's affirmative defenses (such as * * * the statute of limitations) may depend on facts peculiar to each plaintiff's case, *class certification is erroneous*." *Broussard*, 155 F.3d at 342 (emphasis added; internal quotation omitted). The court noted

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[3] The third element of fraudulent concealment, concealment itself, also requires an individualized inquiry in cases where, as here, plaintiffs allege that the concealment consisted of independent communications by defendants with members of the plaintiff classes.

that the misrepresentations on which plaintiffs based their fraudulent-concealment argument varied from franchisee to franchisee, and therefore required an individualized inquiry into what each franchisee knew about the franchisor's operation and when the franchisee knew it. *See id.* Moreover, the court noted, some franchisees had actual knowledge that funds the franchisees had paid for use in advertising were being used for allegedly improper payments. *See id.* For these reasons, the court concluded that class certification was inappropriate. *See id.*

The First Circuit, however, has flatly disagreed with *Broussard*. In *Waste Management Holdings, Inc. v. Mowbray*, 208 F.3d 288 (2000), the First Circuit squarely held that reliance on the doctrine of fraudulent concealment will not preclude class certification. In so concluding, the First Circuit reviewed the certification of a class of stock purchasers who brought state-law claims for breach of contractual warranty against a company that allegedly had made misrepresentations in its financial statements. *See id.* at 291. The district court recognized that a number of the claims at issue would have been time-barred but for the doctrine of fraudulent concealment, but reasoned that the factual questions at issue centered on the fact that the defendant had exclusive control over the collection and release of its financial data. *See id.*

The First Circuit agreed, and affirmed the district court's decision to certify the class. *See id.* at 299. Writing for the court, Judge Selya reasoned that, while the existence of individual issues relating to limitations defenses "invariably weighs against class certification," it was inappropriate to treat the presence of individual issues as an "automatic disqualifier" under the predominance requirement of Rule 23(b)(3). *Id.* at 296. The court added that "[a]s long as a sufficient constellation of common issues binds class members together, variations in the sources and application of statutes of limitations will not automatically foreclose class certification

under Rule 23(b)(3)," *id.* (citation omitted), and that "[p]redominance under Rule 23(b)(3) cannot be reduced to a mechanical, single-issue test," *id.* (footnote omitted).

In its analysis, the First Circuit expressly rejected the Fourth Circuit's suggestion in *Broussard* that class certification was inappropriate whenever the defendant's affirmative defenses (such as the statute of limitations) may depend on facts peculiar to each plaintiff's case. *See id.* at 296 n.4. The court asserted that the Fourth Circuit's reasoning, "to the extent that it purports to establish a *per se* rule, contradicts the weight of authority and ignores the essence of the predominance inquiry." *Id.* The court proceeded to uphold the district court's conclusion that individual issues relating to limitations defenses did not predominate. *See id.* at 297.[4]

In its opinion in this case, the Third Circuit not only expressly recognized the split between the First and Fourth Circuits, but it also expressly took sides. After a lengthy quotation from the First Circuit opinion in *Waste Management*, the Third Circuit embraced the First Circuit's reasoning, stating outright that it "accept[ed] this reasoning as more persuasive than that espoused by the Court of Appeals for the Fourth Circuit in *Broussard*." App. 32a. In so doing, the Third Circuit deepened the preexisting split. Moreover, the Third Circuit indicated that its analysis did not turn on the facts of the instant case, but rather that it was establishing a categorical rule that common issues always predominate with respect to fraudulent concealment. The court stated in unqualified terms that "[i]t is

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[4] In *In re Sumitomo Copper Litig.*, 262 F.3d 134 (2001), the Second Circuit refused to allow an appeal of a district court decision certifying a class in which fraudulent concealment was alleged, but seemed to suggest that, if it had reached the merits, it either would have agreed with the First Circuit that common issues predominate, or simply would have modified the class definition to carve out the otherwise time-barred claims, *see id.* at 143.

the fact of *concealment* that is the polestar in an analysis of fraudulent concealment," and added that "[t]hese allegations of proof are all common to the defendants, not the plaintiffs." *Id.* at 32a-33a. Because the Third Circuit's decision is squarely in conflict with the Fourth Circuit's equally (if diametrically) unconditional decision in *Broussard*, *certiorari* is warranted.[5]

Even beyond the split of authority among the courts of appeals, *certiorari* is all the more appropriate because a significant number of district courts have come down on both sides of the split. Many district courts have held that class certification is inappropriate in cases in which fraudulent concealment has been alleged. *See, e.g., Hall v. Burger King Corp.*, No. 89-0260-Civ, 1992 WL 372354, at *9 n.8 (S.D. Fla. Oct. 26, 1992); *Wagner v. Central La. Elec. Co.*, 99 F.R.D. 279, 289-90 (E.D. La. 1983); *Township of Susquehanna v. H&M, Inc.*, 98 F.R.D. 658, 668 (M.D. Pa. 1983); *Daniels v. Amerco*, No. 81 Civ. 3801, 1983 WL 1794, at *4 (W.D.N.Y. Mar. 10, 1983); *In re Anthracite Coal Antitrust Litig.*, 78 F.R.D. 709, 719-20 (M.D. Pa. 1978); *Rubenstein v. Rossmoor Constr. Corp.*, Civ. No. Y-76-1033, 1978 U.S. Dist. LEXIS 19224, at *12 (D. Md. Mar. 6, 1978); *Krehl v. Baskin-Robbins Ice Cream Co.*, 78 F.R.D. 108, 124 (C.D. Cal. 1978); *Lohse v. Dairy Comm'n of Nev.*, No. R-75-194-BRT, 1977 WL 1523, at *4 n.1 (D. Nev. Dec. 21, 1977); *Chevalier v. Baird Sav. Ass'n*, 72 F.R.D. 140, 153-54 (E.D. Pa. 1976); *Chmieleski v. City Prods. Corp.*, 71 F.R.D. 118, 160 n.38 (W.D. Mo. 1976); *In re Transit Co. Tire Antitrust Litig.*, 67 F.R.D. 59, 74 (W.D. Mo. 1975); *Bill Minnielli Cement Contracting, Inc. v. Richter Concrete*

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[5] On the closely related question whether individual issues predominate with respect to affirmative *fraud* claims, courts of appeals have generally held that they do, since such claims require scrutiny of the plaintiffs' reliance as well as the defendant's conduct. *See, e.g., Johnston v. HBO Film Mgmt., Inc.*, 265 F.3d 178, 189-94 (3d Cir. 2001); *Zimmerman v. Bell*, 800 F.2d 386, 390 (4th Cir. 1986); *Simon v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 482 F.2d 880, 882-83 (5th Cir. 1973).

Corp., 62 F.R.D. 381, 390 (S.D. Ohio 1973).

Other district courts have held exactly the opposite. *See, e.g., In re Flat Glass Antitrust Litig.*, 191 F.R.D. 472, 488 (W.D. Pa. 1999); *In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 519-20 (S.D.N.Y. 1996); *In re Indus. Diamonds Antitrust Litig.*, 167 F.R.D. 374, 384-85 (S.D.N.Y. 1996); *In re Aluminum Phosphide Antitrust Litig.*, 160 F.R.D. 609, 615 (D. Kan. 1995); *In re Potash Antitrust Litig.*, 159 F.R.D. 682, 698-99 (D. Minn. 1995); *In re Catfish Antitrust Litig.*, 826 F. Supp. 1019, 1044 (N.D. Miss. 1993); *In re Infant Formula Antitrust Litig.*, No. MDL 878, 1992 WL 503465, at *6 (N.D. Fla. Jan. 13, 1992); *Town of New Castle v. Yonkers Contracting Co.*, 131 F.R.D. 38, 42-43 (S.D.N.Y. 1990); *In re Wirebound Boxes Antitrust Litig.*, 128 F.R.D. 262, 272 (D. Minn. 1989); *Fisher Bros. v. Mueller Brass Co.*, 102 F.R.D. 570, 579 (E.D. Pa. 1984); *Abramovitz v. Ahern*, 96 F.R.D. 208, 218 (D. Conn. 1982); *In re Screws Antitrust Litig.*, 91 F.R.D. 52, 58 (D. Mass. 1981); *In re Glassine & Greaseproof Paper Antitrust Litig.*, 88 F.R.D. 302, 307 (E.D. Pa. 1980); *In re Fine Paper Antitrust Litig.*, 82 F.R.D. 143, 154-55 (E.D. Pa. 1979); *Hedges Enters., Inc. v. Continental Group, Inc.*, 81 F.R.D. 461, 476 (E.D. Pa. 1979); *In re Indep. Gasoline Antitrust Litig.*, 79 F.R.D. 552, 559 (D. Md. 1978); *In re Plywood Antitrust Litig.*, 76 F.R.D. 570, 585-86 (E.D. La. 1976); *In re Sugar Indus. Antitrust Litig.*, 73 F.R.D. 322, 348 (E.D. Pa. 1976).

This disarray is especially noteworthy because district-court decisions on class certification were only rarely susceptible to interlocutory review until the adoption in 1998 of Rule 23(f), which authorized courts of appeals, at their discretion, to hear interlocutory appeals from class-certification decisions. All but one of the above-cited district-court decisions were issued before 1998, and the relative difficulty in obtaining interlocutory review in the pre-23(f) era perhaps suggests that the split of authority at the court-of-appeals level would be even deeper had interlocutory review been more readily available.

At a minimum, the large number of dissonant district-court decisions on this issue illustrates its frequent recurrence.

Finally, this case presents a perfect vehicle for addressing the question presented. Before the district court, petitioners introduced evidence that each of the five named plaintiffs stood in a unique position with respect to the individual issues of discovery and diligence. On the one hand, the president of Garrett Paper testified that she was "sure" that her vendor, one of the petitioners, was engaging in illegal activity when her company's purchase price for corrugated boxes increased during the class period, and added that she even went so far as to accuse her vendor of price fixing. On the other hand, the evidence indicated that General Refractories had no communications at all with any of the petitioners (aside from invoices) during the class period. The Third Circuit painstakingly catalogued all of this evidence, but inexplicably did not comment on it in concluding that common issues predominated with respect to fraudulent concealment. *See* App. 30a n.13. Because the courts below had before them uncontroverted evidence that individualized inquiries were required as to the issues of discovery and diligence, the question whether those individual issues preclude class certification is squarely presented here.

Whether class actions can proceed when a substantial portion of the class members' claims would be barred but for proof of fraudulent concealment is a vital question to litigants in antitrust cases and beyond. Class-action defendants should not be forced to wait until the damages phase in order to litigate individual issues relating to their limitations defenses. Such a rule would contravene the very purpose of statutes of limitations, which is to provide repose from being forced to litigate time-barred claims at all. *See, e.g., Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 486 (1988). The Court should grant *certiorari* to resolve the circuit split on this recurring question of great practical and legal importance.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of *certiorari*.

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